

61348

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

A. Pogany

FL II

**FILE: B-190074**

**DATE: April 25, 1978**

**MATTER OF: Chemical Technology, Inc.**

**DIGEST:**

1. Incumbent contractor's protest concerning ambiguities in IFB will not be considered by GAO where claims based on same issues were previously filed by incumbent contractor under identical contractual provisions as those protested and are currently pending before contract appeals board.
2. IFB provision in mess attendant services contract allowing Government to assign military personnel to perform services where contractor fails to maintain adequate level of services does not result in illegal personal services contract.
3. Inclusion of typical meal preparation worksheets in IFB was clearly for informational purposes only and did not render IFB ambiguous.

Invitation for bids (IFB) No. N00123-77-B-1132 was issued on June 15, 1977, by the Naval Regional Procurement Office, Long Beach, California, for mess attendant services to be provided for the period October 1, 1977, through September 30, 1978, with an option for two additional years. The IFB established September 8, 1977 as the bid opening date.

In a mailgram dated August 23, 1977, Chemical Technology, Inc. (CTI), the incumbent contractor, advised the contracting officer that it believed there were ambiguities in the IFB and requested clarification. Specifically, the mailgram contained twenty-five detailed questions concerning various provisions of the solicitation. Amendment 0002 to the IFB, extending the bid opening date to September 22, 1977, and incorporating CTI's August 23, 1977 questions and the Government's

answers in response thereto, was subsequently issued to clarify the solicitation. Upon receipt of this amendment, CTI, not being satisfied with certain aspects of the agency's clarification of the IFB, protested any award under the IFB to our Office, on the ground that ambiguities still existed in the solicitation. Bids were opened as scheduled, and the agency, on September 29, 1977, proceeded with award under the solicitation notwithstanding CTI's protest.

CTI's allegation that there were ambiguities in the IFB is based on its interpretation of various provisions of the solicitation. First, CTI contends that while the solicitation contains the estimated number of meals per month for the basic contract period, the monthly meal estimates for the option periods are not expressly set forth, and that, therefore, the IFB is "completely void of the estimated meals for the two option years." The Navy's position is that by the terms of the option, the basic contract period estimates are equally applicable to the option periods, subject to appropriate adjustments upon the exercise of the option to reflect any estimated increase or decrease in the monthly "meal volume."

The second alleged ambiguity asserted by CTI is based on Section F.1(b) of the specifications, which provides:

"The Contractor shall provide, in addition to the specification services set forth in the Specifications for Mess Attendant Services, emergency services requested by the Food Services Officer. These requests shall be deemed to be changes within the meaning of the 'Changes' clause and shall be subject to the provisions of that clause."

CTI requested from the Navy a definition of "emergency services", maintaining that additional meals served to reserve personnel on two week active duty for training were "emergency services" within the meaning of this section. The Navy's response was that meals served to authorized personnel, including reservists, within the volume variation provision of the solicitation, would not entitle a contractor to any equitable adjustment

under the "Changes" clause. CTI considered this response as "unacceptable".

For the reason stated below, we decline to consider these two contentions of CTI concerning alleged ambiguities in the IFB, that is, the applicability of the base contract period meal estimates to the option periods and the definition of "emergency services". CTI, as the incumbent contractor, performed under the previous contract containing the identical provisions and filed several claims against the Navy for additional compensation, currently pending before the Armed Services Board of Contract Appeals (ASBCA), based on these same two issues that it is now arguing as ambiguities in this protest. We do not believe that CTI should be allowed to collaterally argue its interpretation of these provisions in two forums concurrently. The correct interpretation of these provisions, as they relate specifically to CTI, are properly a matter for the ASBCA to decide under the disputes procedure. Accordingly, these two issues will not be considered on the merits. See Cosmos Engineers, Inc., B-187457, March 31, 1977, 77-1 CPD 222; Delta Electric Construction Company, B-182820, March 28, 1975, 75-1 CPD 188.

CTI's next contention concerns the following provisions of the specifications:

"F.6. \* \* \* Sufficient Contractor personnel will be present at all times to efficiently and expeditiously render all services required by the contract, including but not limited to serving, clearing tables and cleaning up after serving.

\* \* \* \* \*

"J. \* \* \* (I)f the Contractor does not furnish the number of employees required

to perform the services called for in this contract, the commanding officer of the activity may assign military personnel to perform the services. Such action by the Government will not relieve the Contractor of his responsibility for performance. The Contractor shall compensate the Government for the services of such military personnel as may perform work under the contract."

Based on these specifications, CTI argues as follows:

"CTI believes the provisions of the solicitation set the conditions for a personal service contract wherein performance is monitored, managed, and directed by a government official.

\* \* \* \*

"Under the provisions of Section F.6. a declaration is made by the government that sufficient contractor personnel must be present at all times. In the Attachment A, specifications, the food service officer is granted the authority to complete a food service rating sheet which rates if adequate number of employees are present to conduct and perform the services involved with operating the mess hall. At this time when the food service officer declares that inadequate personnel are available he then proceeds to implement the authority in Section J to temporarily assign military personnel to supplement the contractor efforts. Based on our experience in the predecessor contract we found frequently that the food service officer used this scheme to direct the contractor to add necessary personnel in the performance of the work. CTI believes that the structure of the solicitation and

resulting contract therefore is a violation of law. \* \* \*

In reply, the Navy argues as follows:

"As pointed out by the protester, the mess attendant services contracts contain several provisions which give the Food Services Officer a degree of authority to ensure that the services rendered are at an adequate level. The need for such authority arises, of course, from the inherent characteristics of the contracted-for effort: meals must be served, and cleanliness must be maintained, on a day-to-day basis. The necessary immediacy of response makes untenable reliance solely upon written contracting officer directives to ensure adequate performance. This authority, however, does not extend to the point of converting the contract to one for personal services. The Food Services Officer has no direct authority over individual employees of the contractor. The language cited by the protester does not create a personal services relationship, but rather reflects a central concept of fixed-price mess attendant services contracting: that the contractor is responsible for providing a required level of services, regardless of the number of personnel needed."

In general, any contract which creates an employer--employee relationship between the Government and employees of a contractor violates Federal law. Criteria for recognizing personal services are set forth in Armed Services Procurement Regulation (ASPR) § 22-102.2 (1976 ed.); they include the nature of the work to be performed and the amount of supervision and control exercised by the Government. A Government contract for the performance of a service is to be accomplished without detailed Government control or supervision

over the method by which the required result is achieved. 45 Comp. Gen. 649 (1966). In the present case, Section F.2 of the IFB, requires the contractor to furnish managerial, administrative, and direct labor supervision at all times during contract performance. It is the responsibility of the contractor alone to furnish and supervise adequate personnel qualified for the work. The specification provisions cited by CTI merely give the Government enforcement powers to ensure the performance of an adequate level of services by the contractor. We do not believe that the reservation of such remedial enforcement powers by the Government under the IFB in any way constitutes the creation of an illegal employer--employee relationship between the Government and contractor personnel.

Lastly, CTI alleges an ambiguity in the solicitation concerning meal preparation. The solicitation contained the following:

Estimated number of meals per month:

2 Months @	40,000
4 Months @	45,000
6 Months @	55,000

The solicitation also contained typical meal preparation worksheets showing the portions and quantities of different food items required to be prepared. CTI requested the agency to clarify which estimated monthly level of meals related to the portions and quantity shown on the meal preparation worksheets. CTI was informed that the typical meal preparation worksheets were included in the solicitation as examples only. In its report to our Office, the Navy states as follows:

"During the potential life of this contract, [meals will be served on more than 3,000 separate occasions]. It begs reason to anticipate that a significant portion of those meals

B-190074

could be identified and described in the solicitation. Furthermore, such descriptions would be of no real value. The specifications include sufficient detail to enable a company experienced in food services to ascertain the levels of manning required."

We agree and find no ambiguity in the solicitation in this regard. It is apparent that the limited number of meal preparation worksheets included in the IFB was for informational purposes only and it is the responsibility of the contractor to estimate and provide the necessary personnel levels for satisfactory performance.

Accordingly, the protest is denied.

Deputy

*R. F. K. 11m*  
Comptroller General  
of the United States